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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-428

HALIFAX LOCAL NO. 25, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, *Petitioner*

v.

JOSEPH P. MOODY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Halifax Local No. 25, United Papermakers and Paperworkers, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals entered February 20, 1973 (Appendix (App.) A, *infra,* pp. 1a-25a) is reported at 474 F.2d 134. The opinion and order of the district court, entered November 9, 1971 (App. B, *infra,* pp. 26a-57a), is reported at 4 FEP Cases 561.

JURISDICTION

The judgment of the court of appeals (App. C., *infra,* p. 58a) was entered on February 20, 1973. Petitioner's timely petition for rehearing with suggestion

for rehearing in banc was ultimately denied on July 22, 1974 (App. E, *infra,* p. 60a-61a). The order of the court of appeals (App. D., *infra,* p. 59a-60a), directing that its mandate be stayed for a period not to exceed thirty days, pending the filing of applications to this Court for a writ of certiorari, was entered on September 13, 1974.[1] The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether in construing the remedial provisions of the Civil Rights Act of 1964, the court of appeals has power to order the district court—in this and virtually all other cases henceforth—to award "back pay" as a matter of course to complainants whenever unlawful employment practices are enjoined, despite the Congressional intendment as set forth in § 706(g) of the Act, that the district court in its discretion "may . . . order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ."

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[1] The highly unconventional course of the antecedent proceedings is detailed in our Statement of the Case (*infra,* p. 3), involving as it does the convening of a rehearing in banc which was aborted after oral argument but prior to the issuance of a decision. In view of the subsequent resolution by this Court of a question of judicial administration critical to the granting of the in banc rehearing, certified pursuant to 28 USC 1254(3) (*Moody* v. *Albemarle Paper Co.*, —*U.S.*—, 41 L.Ed. 358, 91 S. Ct. —), the court of appeals on July 22, 1974 retroactively "denied" the petitions for rehearing and suggestion for rehearing in banc (filed by Petitioner herein and by the employer, Albemarle Paper Company) and "rescinded" its order for the rehearing in banc, which had been entered July 25, 1973 (*infra,* p. 6; App. E, *infra,* pp. 60a-61a).

STATUTES INVOLVED

The pertinent provisions of Sections 701(b), 703(a), 703(c), 703(h), 705(a), 706(a), 706(e), 706(f), 706 (g), 706(k), and 716(a), Title VII, Civil Rights Act of 1964, 78 Stat. 241, 42 USC § 2000(e) *et seq.*, are set forth in Appendix F, *infra*, pp. 61a-64a.

STATEMENT OF THE CASE

The Proceedings in the District Court and Court of Appeals Prior to the In Banc Rehearing

In November, 1971, the district court concluded, in a class action suit brought against the Albemarle Paper Company and Halifax Local No. 25, United Papermakers and Paperworkers, AFL-CIO (the Union, petitioner herein) under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e, et seq.), that the seniority system of the Company, at its Roanoke Rapids, North Carolina plant, operated to continue the effects of past discrimination which had not been eradicated, and ordered it restructured, with the substitution of plant for job seniority. The district court denied the plaintiffs' request for an award of back pay to the class, on multiple grounds including corrective action taken over the years and prejudice to the employer and union defendants resulting from the belated assertion of a monetary claim nearly five years after institution of the action, reversing an earlier and long-standing disclaimer on the score. (App. B, *infra*, pp. 47a-48a). The trial court also held that the Company had sustained its burden of proving that its pre-employment personnel testing procedures had undergone requisite validation and were job related, hence non-discriminatory.

On appeal of the testing and back pay rulings, a majority of the court below, on February 20, 1973, re-

versed the district court on both issues. Designated and assigned to the three-judge division which heard the case, were the court's two retired or senior judges, along with Judge Craven, who is in regular and active service. A different senior judge joined Judge Craven to constitute a majority for reversal and remand on each ground of appeal—and, correspondingly, a different senior judge dissented on each of the two issues.[2] With respect to the question of back pay, separate opinions were filed by each of the three judges—opinions that differed demonstrably on the principles of law and statutory construction that should govern review of the exercise of discretion vested in the trial judge under the statute. (App. A, *infra,* pp. 10a-13a, 14a-21a, 24a-25a).

The Convening of the In Banc Rehearing and Its Aftermath

The Union, on March 6, 1973, filed a petition for rehearing with suggestion for rehearing in banc, solely on the back pay issue, as did the Company, but with respect to both the back pay and job testing issues.[3] The Union contended in its petition that the majority opinions on the back pay question introduced entirely novel concepts in judicial interpretation and enforcement of the relevant statutory provisions, with a resultant holding that marked a wide departure from the settled principles theretofore endorsed by the court below and

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[2] Thus (1) on the testing procedures issue, Judge Craven and Senior Judge Boreman were in the majority, with Senior Judge Bryan dissenting, while (2) on the back pay issue, Judge Craven and Senior Judge Bryan formed the majority, with Senior Judge Boreman dissenting.

[3] The Union took no part in the argument on the testing issue, a management prerogative outside the scope of conventional collective bargaining.

the other circuit courts of appeals. The Union urged further that the majority opinions, for all practical purposes, precluded the trial court, in this and all other such potential suits generated at the district court level, from exercising any degree of discretion on the remedial issue of back pay awards, and—contrary to the statutory concept—placed back pay on a mandatory basis.

On June 25, 1973, the court below entered an order granting the petitions for rehearing in banc, with the statement that "a majority of the judges in regular active service, plus Senior Judges Boreman and Bryan, who were members of the original panel, have voted to grant the petitions." Following the filing of supplemental briefs, all parties participated in oral argument at the in banc rehearing convened on October 2, 1973, with the bench composed of the seven active and two senior judges of the court below. However, a decision was never issued, notwithstanding a "tentative vote" to "modify the panel decision with respect to an award of back pay" (App. G, *infra,* p. 66a).

Called into question was the eligibility of the two senior judges—who sat on the original division by designation—to vote in the threshold determination of whether the case should be reheard in banc, since both "voted for it", while "a majority of the judges in active service did not"; the affirmative votes of the two senior judges proved "crucial" to "providing a majority of the counted votes in favor of rehearing in banc" (App. G, *infra,* pp. 66a, 67a.).[4] This Court held,

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[4] It was the "custom of the court below" to count the votes of senior circuit judges who were members of the initial hearing panel "when the court was polled on the question of *en banc* rehearing, . . . since the voting senior circuit judge would be a member of the *en banc* court if rehearing were granted" (App. G, *infra,* p. 67a).

the question having been submitted in the interim by certificate of the court below pursuant to 28 USC § 1254(3), that "senior circuit judges who are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc". *Moody* v. *Albemarle Paper Co.*, — U.S. —, 41 L.Ed. 358, 360, 94 S.Ct. — (June 17, 1974).

The court below, by order of July 22, 1974, declared that, in view of this Court's decision, its order entered a year earlier "setting this case for rehearing in banc" was currently "rescinded" as "improvidently entered", and the initial "petitions for rehearing and rehearing in banc" were "denied" (App. E, *infra*, pp. 60a-61a). Thus the initial decision and judgment of the three-judge panel were reinstated.[5]

The Initial Panel Decision on Back Pay To Which the Court of Appeals Reverted

A divided court of appeals, reversing the district court's discretionary refusal to award back pay, held that "a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act, should ordinarily be awarded back pay unless special circumstances would render such an award unjust" (App. A, *infra*, p. 13a; footnote omitted). Illustrative of the caliber of "special circumstances the majority would require "to justify refusal of a back pay award", is the example cited, wherein an employer

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[5] Upon motions filed by both the Company and the Union, the court of appeals recalled its judgment (issued in lieu of mandate) and granted a stay of mandate not to exceed thirty days from September 13, 1974, pending the filing of petitions for a writ of certiorari (App. D, *infra*, p. 59a). *Cf.*, Federal Rules of Appellate Procedure 28 USC Rule 41(b).

pleaded the necessity of complying with state protective legislation, limiting the hours of work for female drivers, as a defense against charges of employment discrimination.[6] This back pay doctrine—announced for the first time and declared binding upon the district courts—was premised in essential part on the view that "a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorneys' fees under Title II of the Civil Rights Act"; thus, either "are to be awarded as of course in the absence of 'special circumstances' " (App. A, *infra*, p. 13a).

"Strenuous objections" to the foregoing rationale were raised by the dissenting judge, who pointed to "the fallacy" of equating the granting of attorneys' fees under Title II of the Civil Rights Act of 1964 [in accordance with *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968)], with back pay under Title VII of the Act (App. A, *infra*, p. 14a). In concluding that "the award of back pay, unlike the grant of attorneys' fees, is an element of affirmative relief which has been entrusted to the more general discretion of the district courts", the dissenting opinion emphasized the significance of two factors: (1) that "the congressional separation of these two provisions indicated an intent to treat them independently"; and (2) that while back pay is among "the equitable remedies which the district court may use in fashioning relief", there is no evi-

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[6] A factor that was held exculpatory until the statute relied upon was declared invalid. (App. A, *infra*, p. 13a, footnote 5). "*Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir., June 20, 1972; *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602, 610-11 (E.D. La. 1971), aff'd per curiam, 460 F.2d 1228 (5th Cir., 1972)". The *LeBlanc* case, *supra*, presented a closely analogous situation.

dence of "congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies" (App. A, *infra*, p. 15a; footnote omitted).

The dissenting opinion further stressed the impropriety of overriding the "equitable balancing power" vested by statute in the district court, which is charged "with the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case"—a function "properly left in the hands of the district courts which are more intimately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal" (App. A, *infra*, pp. 17a-18a; footnote omitted).

REASONS FOR GRANTING THE WRIT

1. This case presents a novel and important question of federal law which has not been but should be decided by this Court. The issue was resolved by the court below incompatibly with settled principles of appellate review as well as the time-honored prohibition against the substitution of judicial for legislative judgment in statutory construction, and hence warrants immediate consideration by this Court.

The majority opinions, requiring that "back pay ordinarily be awarded" if an injunction issues, for all practical purposes preclude the trial court, in this and future cases, from exercising any degree of discretion on the remedial aspect of back pay awards, in deciding cases under Title VII of the Civil Rights Act of 1964 (the Act). This approach is in the teeth of the now familiar phraseology (of Section 706(g))[7] providing

[7] 42 USC § 2000(e)-5 (App. F, *infra*, p. 64a).

that the "court *may* enjoin the respondent from engaging in such unlawful practice, and order such affirmative relief as *may* be appropriate, which *may* include reinstatement or hiring of employees, with or without back pay . . .". (Underscoring supplied.) Indeed, over the course of almost a decade in the operation of the Act, as this Court has observed, in "Title VII cases . . . the courts have relied on the fact that the decision whether to award back pay is committed to the decision of the trial judge". *Curtis* v. *Loether*, — U.S. —, 39 L.Ed. 2d 260, 268, 94 S.Ct. —.

The decision below thus marks a definitive breach of that judicial precedent, and is of manifest general and public importance. If the broad edict of the court below remains undisturbed, it will predetermine all present and potential suits involving this issue that may be generated at the district court level within the aegis of the Fourth Circuit, with far-reaching consequences for both the labor force and management side in the industrial sector of our economy, to say nothing of the effective enforcement of the Act itself.

The legislative history of Title VII of the Act leaves no doubt that the approach reflected in the decision below is contrary to the intent of Congress on this score. The power to order appropriate affirmative action, as finally embodied in Section 706(g) of the Act, was deliberately placed on a discretionary basis, with the responsibility for the exercise of that discretion lodged with the Federal district court bench. While the original version of the bill in the House of Representatives, provided for mandatory affirmative relief (H.R. 7152), the provision in question was reversed in the Senate

(Amendment No. 656). As Senator Dirksen explained:[8]

> "The mandatory requirement for affirmative action, including reinstatement and back pay, upon a finding of violation, has been revised to read '*may* . . . order such affirmative action as may be appropriate, which *may* include reinstatement and back pay' ". (Emphasis added.)

Some seven years after enactment, the original pattern of Section 706(g) was etched even more sharply by the Congress in the 1972 Amendments.[9] Added to its "affirmative action" feature, (*viz.*, "and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay") was the further permissive clause —"or any other equitable relief as the court deems appropriate", thus strengthening the discretionary hand of the district court to tailor its decree to the requirements of the particular case.

Nevertheless, the court below, almost a year later, moved in the opposite direction to announce an inflexible position which the Congress had considered and rejected both in 1972, and earlier in 1964. In so doing, the majority opinion seriously overreached the "function of the court of appeals" which "is to review the relief the district court grants in the light of the findings and supporting record and to determine if there

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[8] 110th Cong. Rec. 12381-85 (June 5, 1964).

[9] The Equal Employment Opportunity Act of 1972, Public Law 92-961, approved March 24, 1972.

has been an abuse of discretion",[10] but not to "substitute its discretion for that of the district court".[11]

The decision below works mischief in the law on still another ground. To the extent that the mandatory back pay holding below promulgates a hard and fast rule which the subordinate district courts must follow in the future to forestall reversal, it compromises the prohibition implicit in Article III of the Constitution against federal courts passing on claims not ripe for determination.

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." C. Wright, *Federal Courts* 34 (1963). As this Court stated in *United States* v. *Fruehauf*, 365 U.S. 146, 157, "such advance expressions of legal judgment upon issues which remain unfocused" are inappropriate because they "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests * * *."

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[10] *United States* v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir., 1970).

[11] *Larson* v. *United States*, 296 F.2d 167, 170 (8th Cir. 1961).

As this Court pointed out long ago in *Langes* v. *Green*, 282 U.S. 531, 541 (1931):

> "The term 'discretion' denotes the absence of a hard and fast rule. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Accord: *Burns v. United States*, 287 U.S. 216, 222-223 (1932).

The adverse effects, in the field covered by this reform legislation, of improperly expanding the role of the court of appeals while severely constricting that of the district court, contrary to Congressional design, are manifold.

In enacting Title VII and making it mandatory that the Equal Employment Opportunity Commission "*shall* endeavor to eliminate any such alleged employment practice by informal methods of conference, conciliation and persuasion" (42 USC 2000e(5)(b), italics added), Congress established a statutory scheme which seeks to utilize these techniques to the full in remedying employment discrimination.[12] The court decisions have uniformly implemented this legislative objective, and the 1972 Amendments to Title VII, carry forward a renewed faith by the Congress in the efficacy of this approach.[13] However, by virtually guaranteeing complainants under the Act, an award of back

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[12] As one student of the legislative history stated:

> "Congress apparently decided that the objectives of the Act could be better served by giving the informal measures of conciliation and persuasion a chance to work . . . . The conciliation process has several features which recommend it: it may solve problems without the animosities created by coercion; it gives the respondent a change to explain and possibly justify his conduct before litigation receives widespread public attention; it is less expensive and time consuming than litigation; and broad relief is available . . ." 84 Harvard Law Review 1109, 1199-1200 (1971).

[13] In introducing the conference report of House Resolution No. 1746, Representative Perkins stated:

> "Conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in federal district court to seek enforcement." Cong. Rec.—House, p. 1861 (March 8, 1972).

pay or differential pay if discrimination is judicially determined under whatever circumstances, the majority opinion would place an undue premium on litigation, however protracted, in derogation of the conciliation feature of the Act. No one is well served by this result, least of all those whom the Act is primarily designed to protect.

Another important consequence is the peril which labor organizations now face—whether locals like Petitioner herein, with only meager resources, or international unions—in the prospect of meeting formidable or enormous assessments by way of back pay liability, to say nothing of defraying plaintiffs' attorneys' fees as well, that threaten to strip their funds to the point of bankruptcy. Typically, union liability, as here rests on the judicially developed theory that it was a party to a collective bargaining contract which, through its seniority system, carried over the effects of past (pre-Act) discrimination.[14] Nothing in the legislative history of the Act suggests that Congress, or indeed the leadership of the AFL-CIO which was in the forefront of those advocating the enactment of anti-discrimination legislation, envisaged this development, imposing, as it does, a tension and conflict between two national labor policies, embodied in landmark legislation. The one, set forth in the National Labor Relations Act,[15] was to promote collective bargaining procedures through freely chosen representatives, with the necessary costs of performing these traditional union functions spread

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[14] *Local 189, United Papermakers and Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[15] National Labor Relations Act, As Amended (61 Stat. 136, 73 Stat. 519) 29 USC 151 *et seq.*

among all the employees who benefit.[16] The other, incorporated in Title VII of the Act, established a new category of unfair employment practices covering racial and other working minorities, in effect, supplementing the unfair labor practices defined by the National Labor Relations Act some three decades earlier.

In the case at bar and numerous others that run parallel in the industrial sector, the plaintiffs pursuing the class action are likewise active and supportive members of the union, which is joined as a co-defendant along with the employer, and hence likewise a target, of late, for back pay claims by the affected class.[17] Thus court orders directed against a union for monetary liability, may benefit a member of the plaintiff class at first blush, but at the same time work to his detriment as a member of the union who pays dues—the sole source of union revenue—and depends upon union bargaining skills and services.

The difficulty is an obvious one, if, as may be the case, the monetary order in question is of such proportions as to threaten the union with financial ruin. That is why the decision below should not be permitted to negate the legislative wisdom, which left the district court free to fashion a remedial order according "to what is right and equitable under the circumstances

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[16] *Cf., International Association of Machinists* v. *Street,* 367 U.S. 740, 755, 760-761.

[17] In the first five or six years after the effective date of the Act, when litigation focused upon the question of restructuring seniority rights and the substantive obligations of employers, the Department of Justice did not request back pay in its so-called "pattern and practice suits" filed under the Act. E.g.: *Local 189, United Papermakers and Paperworkers* v. *United States, supra.*

and the law". *Lagnes* v. *Green, supra,* 282 U.S. at 541. Here, as under the National Labor Relations Act from which the back pay concept was derived,[18] this Court's view appears equally pertinent (*Phelps Dodge* v. *N.L.R.B.,* 313 U.S. 177 (1941)):

> "Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations." (313 U.S. at 198.)

2. There is a bluntly stated conflict between the decision of the United States Court of Appeals for the Third Circuit in *Kober* v. *Westinghouse Electric Corp.,* 480 F.2d 240 (3rd Cir. 1973) and the decision below. Sustaining the district court's conclusion that "the award of back pay was discretionary and . . . inappropriate in the circumstances of this case," a unanimous Third Circuit took direct issue with the majority opinion below, adopting instead the "more persuasive reasoning" of "the dissenting opinion of Judge Boreman." The court of appeals in *Kober* reaffirmed the traditional judicial test:

> "The statute says that the court may order such affirmative action as may be appropriate, with or without back pay. It is our determination that this language clearly leaves the award or denial of back pay to the discretion of the district court, to

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[18] See, e.g.: *Legis. Hist. Titles VII and XI of Civil Rights Act of 1964,* at 3015, 3039, 3041 (EEOC undated).

> be exercised in the light of all the circumstances of each case."

(480 F.2d at 246-247).

More importantly, the disarray into which the decision below casts the question at issue by its abrupt departure from long-standing judicial precedent, including the earlier contrary decisions of the Fourth Circuit, calls for an exercise of this Court's power of supervision. As this Court recognized in *Curtis* v. *Loether, supra,* the cases are legion in which the courts have subscribed to the standard of review restated in *Kober* v. *Westinghouse Electric Corp., supra.*

The schism within the Fourth Circuit itself is highlighted by the initial grant of an in banc rehearing, which, while aborted prior to final decision for extraneous reasons concerning appellate procedure, nonetheless produced a "tentative vote to "modify the panel decision with respect to an award of back pay" (*supra,* p. 5). While the circumstances are extraordinary, with the in banc rehearing nullified, they afford a revealing insight into the different schools of thought on this issue still extant in the circuit below.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

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